

# ZUCKERT SCOUTT & RASENBERGER, L.L.P.

ATTORNEYS AT LAW

888 Seventeenth Street, NW, Washington, DC 20006-3309  
Telephone [202] 298-8660 Fax [202] 342-0683  
www.zsrlaw.com

SHANNON M. MOYER

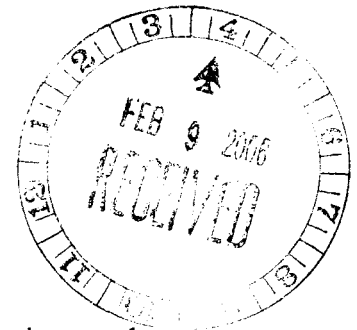
DIRECT DIAL (202) 973-7935  
smmoyer@zsrlaw.com

February 9, 2006

## **BY HAND**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Office ENTERED  
Public Record



Re: Finance Docket No. 33388 (Sub-No. 100), CSX Corporation, et al. –  
Control and Operating Leases/Agreements – Conrail, Inc., et al. (Norfolk  
Southern's Motions in Response to BRI Petition for Clarification or  
Supplemental Order)

Dear Secretary Williams:

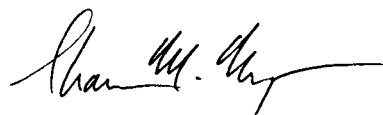
Enclosed for filing in the above-referenced docket are the original and ten copies each of Norfolk Southern Corporation's and Norfolk Southern Railway Company's:

1. Motion to Dismiss Bridgewater Resources, Inc.'s and ECDC Environmental, L.L.C., Inc.'s Petition for Clarification or Supplemental Order; and
2. Motion for Protective Order

Also, enclosed is a 3.5" floppy disc containing the text of both the Motion to Dismiss and the Motion for Protective Order.

Please date stamp and return with our messenger the additional copy of the enclosed motions. Thank you for your assistance.

Sincerely,

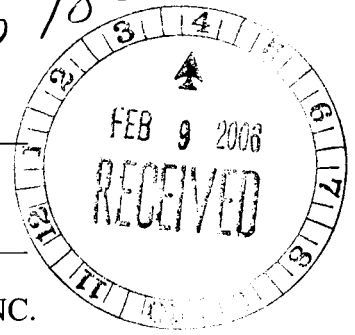
  
Shannon M. Moyer

Enclosures

Before The  
Surface Transportation Board

Finance Docket No. 33388 (Sub-No. 100)

CSX CORPORATION AND CSX TRANSPORTATION, INC.  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY  
— CONTROL AND OPERATING LEASES/AGREEMENTS —  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION



---

**MOTION OF NORFOLK SOUTHERN CORPORATION AND NORFOLK  
SOUTHERN RAILWAY COMPANY TO DISMISS PETITION FOR  
CLARIFICATION OR IN THE ALTERNATIVE FOR SUPPLEMENTAL ORDER  
OF BRIDGEWATER RESOURCES, INC. AND ECDC ENVIRONMENTAL, L.L.C.**

---

ENTERED  
Office of Hearings

FEB 9 2006

Part of  
Public Record

John V. Edwards  
**NORFOLK SOUTHERN  
CORPORATION**  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
(757) 629-2657

Richard A. Allen  
Shannon M. Moyer  
**ZUCKERT, SCOUTT &  
RASENBERGER, LLP**  
888 Seventeenth Street, NW  
Suite 700  
Washington, D.C. 20006  
(202) 298-8660

*Attorneys for  
Norfolk Southern Railway Company*

Dated: February 9, 2006

- CONTAINS COLOR IMAGES -

Before The  
Surface Transportation Board

---

Finance Docket No. 33388 (Sub-No. 100)

---

CSX CORPORATION AND CSX TRANSPORTATION, INC.  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY  
— CONTROL AND OPERATING LEASES/AGREEMENTS —  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

---

---

**MOTION OF NORFOLK SOUTHERN CORPORATION AND NORFOLK  
SOUTHERN RAILWAY COMPANY TO DISMISS PETITION FOR  
CLARIFICATION OR IN THE ALTERNATIVE FOR SUPPLEMENTAL ORDER  
OF BRIDGEWATER RESOURCES, INC. AND ECDC ENVIRONMENTAL, L.L.C.**

---

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “NS”) hereby move to dismiss the “Petition For Clarification Or In The Alternative For Supplemental Order—North Jersey Shared Assets Area” filed on January 20, 2006 by Bridgewater Resources, Inc. and ECDC Environmental, L.L.C. (collectively, “BRI”). By separate motion filed herewith, NS also requests the Board to quash the discovery propounded by BRI or stay all discovery until the Board rules on this motion to dismiss.

**INTRODUCTION AND SUMMARY**

The BRI Petition asks the Board to “clarify” its Decision No. 89 in this proceeding. *CSX Corp., et al.—Control—Conrail Inc., et al.*, 3 S.T.B. 196 (1998) (“*Conrail Control*”) by stating that BRI’s waste transfer facility (the “BRI Facility”) near Port Reading Junction in Somerset County, NJ, is “located within [the North Jersey Shared Assets Area (‘NJSAA’)] and/or may be switched by [Conrail, Inc. (‘Conrail’)].” BRI Pet. at 17. Evidently recognizing the tenuousness of this claim, the BRI Petition asks the Board in the alternative

to issue a supplemental order allowing Conrail to perform switching service between the BRI Facility and nearby Manville Yard of CSX Transportation, Inc. (“CSXT”) *Id.*

NS asks the Board to dismiss this petition because the claim that the BRI Facility is within the NJSAA, raised for the first time six years after Decision No. 89, is clearly refuted by the unambiguous provisions of the Transaction Agreement among NS, CSXT and its parent, CSX Corporation, (collectively, “CSX”) and Conrail that the Board approved in Decision No. 89, including the map that is a part of the Transaction Agreement.<sup>1</sup> There is also no basis for BRI’s alternative request for a supplemental order under 49 U.S.C. § 11327, which is simply a request for competitive access that does not satisfy the requirements of 49 C.F.R. Part 1144.

Although the Petition seems to imply that BRI’s claims present factual issues, the claims are not supported by any facts of substance but instead present essentially issues of law or administrative policy. The claim that the BRI Facility is within the NJSAA relies entirely on the unsupported opinion of a consultant to BRI who contends that the parties to the Transaction Agreement, in defining the boundary of the NJSAA near the BRI Facility as “CP Port Reading Jct.,” did not intend that boundary to be a single point but instead intended it to be an area “between the approach signals for the interlocking.” BRI Pet., Reistrup V.S. at 5. This claim does not raise a genuine factual issue, but only the legal issue of whether the unsupported (and, in NS’s view, plainly unreasonable) opinion of BRI’s consultant can overcome the clear terms of the Transaction Agreement and the map that is a part of it. NS submits that, as a matter of law, it cannot. Accordingly, whether viewed as a request for

---

<sup>1</sup> As discussed more fully below, BRI’s claim that the BRI Facility is itself “located within” the NJSAA reflects a basic misunderstanding of the NJSAA, which consists solely of railroad property, and of the operating rights of NS, CSXT and Conrail within and outside the NJSAA.

clarification of Decision No. 89 or as a petition for a declaratory order, the Petition does not allege sufficient grounds for commencing a proceeding and should be dismissed.

It is also noteworthy that NS has served the BRI Facility since Split Date (June 1, 1999) and has negotiated transportation contracts governing that service, which contracts specify that the movement of cars to and from the facility is to be performed only by NS. The latest such contract was recently negotiated and runs for several more years. *See BRI Pet.* at 4. During that time, including five years of the formal Conrail oversight proceedings, neither BRI nor the previous owner of the facility ever asserted to the Board or, until recently, to NS that the facility was within the NJSAA, a fact that undermines the seriousness of the present BRI Petition. It appears from the Petition that the assertion of this claim at this late date has been prompted by some dissatisfaction with the rates agreed to in the current contract and complaints about recent lapses in service.

NS takes BRI's complaints about service seriously. BRI is a valued NS customer, and NS is making every effort to remedy the problems BRI has identified. NS submits, however, that redrawing the boundaries of NS, CSXT and NJSAA territory is not an appropriate way to address shipper concerns with rates or service.

BRI's alternative request for relief is also without basis. As the Board held in Decision 89, the fact that a shipper might prefer its facility to be within a Shared Asset Area or might prefer to receive service from other railroads in addition to the railroad serving the facility provides no basis for the Board to change the basic agreement negotiated by NS, CSXT and Conrail and the allocation of lines and rail facilities agreed to by those parties. *See Conrail Control*, 3 S.T.B. at 269-270. In essence, what BRI's alternative request seeks is competitive access over the NS line serving its facility. Competitive access claims, however,

are governed by the well and long settled principles established in 49 C.F.R. Part 1144 and cases like *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171 (1986), *aff'd sub nom.*, *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988). Nothing in the BRI Petition, however, suggests, or even alleges, the existence of circumstances that would entitle it to competitive access under those principles.

## STATEMENT OF FACTS

### Decision No. 89 -- Overview

In Decision No. 89, the Board approved and authorized, subject to conditions, a transaction (the "Transaction") under 49 U.S.C. §§ 11321-11325 whereby NS and CSX acquired control of Conrail, divided the use of certain Conrail lines and assets between them, and provided that other Conrail lines, in what are known as three Shared Assets Areas ("SAAs"), were to be owned, operated and maintained by Conrail for the exclusive benefit of NS and CSX. As pertinent here, the Board specifically approved the terms of the Transaction Agreement that allocated lines and assets among CSX, NS and the SAAs and the Shared Assets Operating Agreements among them governing the operation of the SAAs. *See Conrail Control*, 3 S.T.B. at 385-386.

In its decision, the Board found that the Transaction would bring very substantial public benefits, including particularly increased rail competition in the Northeast resulting from the division of Conrail and the establishment of the SAAs. The Board stated: "The most important public benefit resulting from the transaction will be a substantial increase in competition by allowing both CSX and NS to serve where only Conrail served before." *Conrail Control*, 3 S.T.B. at 333.

Because of the obvious competitive benefits flowing from the creation of the SAAs, many shippers and communities not in the SAAs asked the Board to require the Applicants to provide the same treatment to them. The Board declined to do so. It said:

The ICC and the Board have consistently declined to attempt to equalize the rail transportation options of shippers who receive merger benefits with all those who do not. . . . Applicants have proposed a restructuring that makes sense for them as an economic and restructuring matter, while at the same time creating new rail competition for several major cities and many hundreds of shippers. . . . If we were to require trackage rights by a second carrier for every shipper or community that competes with shippers who benefited from the transaction, it is possible, even likely, that this entire transaction would collapse.

*Conrail Control*, 3 S.T.B. at 269-270.

#### **Allocation of Lines Near Port Reading Junction**

The Transaction Agreement defines, both by means of a map and the written word, the various lines allocated to CSX (referred to as “NYC Allocated Assets”), NS (referred to as “PRR Allocated Assets”) and the SAAs (referred to as “Retained Assets”). Schedule I of the Transaction Agreement states at the outset:

Attached to and incorporated in this Schedule are the following Attachments:

(i) Attachment I, which is the line segment allocation list identifying each Route owned, operated or used by CRC and its Affiliates and indicating as to each Route whether it is included in the NYC Allocated assets, the PRR Allocated Assets or the Retained Assets; and

(ii) Attachment II, which is a system map showing all Routes comprising the CRC rail system and indicating by color coding the Routes which are to be NYC Allocated Assets, PRR Allocated Assets and Retained Assets, respectively; Attachment II is intended to show geographically the Routes described in Attachment I.

Schedule I further specifies that lines colored in red and/or orange on Attachment II (hereafter, the “Map”) are NYC Allocated Assets, those in green and/or yellow are PRR Allocated Assets and those in blue are Retained Assets.

The Transaction Agreement also provides that operations of Conrail, NS and CSXT within the SAAs, including the NJSAA, are to be governed by separate Shared Assets Agreements. *See* Transaction Agreement, Sections 1.1 and 2.5.<sup>2</sup> The NJSAA Agreement, like the other SAA agreements, makes clear that, contrary to BRI’s apparent belief, the Shared Assets and the Shared Asset Areas are not broad geographic areas encompassing non-railroad as well as railroad property but consist only of *railroad* property. It defines “Shared Assets” as tracks, rights of way and other property “which CRC [Conrail] owns, leases or has the right to operate over,” and defines “Shared Asset Areas as “the geographical area comprising the Shared Assets and Operator [*i.e.*, NS or CSX] Facilities and Jointly Operated Facilities directly (without intermediate connection to another railroad) attached to trackage included within the Shared Assets . . . .” NJSAA Agreement §§1(ss) and (tt). Most importantly, each Shared Assets Agreement gives Conrail the right to perform switching service *only* “within the Shared Assets Area.” *See* NJSAA Agreement § 3(d)(i). Conrail has no authority to provide switching or otherwise operate over tracks that are not part of the Shared Assets Area, with certain exceptions that are not relevant to BRI’s claim.

Among the lines listed in Schedule 1 of the Transaction Agreement as being allocated to CRC Retained Assets – North Jersey/New York Shared Assets Area is the “Lehigh Line” from “CP Port Reading Jct.” eastward to “Oak Island Yard.” Among the “CRC yards, land

---

<sup>2</sup> Relevant portions of the Transaction Agreement are included in Exhibit 1 to this motion. Relevant portions of the NJSAA Agreement are included in Exhibit 2. Two enlargements of the portions of the Map depicting the lines near BRI’s Facility in New Jersey are attached as Exhibit 3 and Exhibit 4. The entire Transaction Agreement, including the Map, was contained in Volume 8B of the Application in the Conrail Control proceeding and the entire NJSAA was contained in Volume 8C.



and yard access tracks” allocated to NYC is “Manville Yard (subject to use by CRC, CSX and NSR pursuant to Ancillary Agreements.” Schedule 1, Item 1(C)(15). The Lehigh Line running from CP Port Reading Jct. west to Allentown, PA is allocated to PRR. The Trenton Line, allocated to CSXT, connects to the Lehigh Line at or near CP Port Reading Junction. See Exhibits 3 and 4.

According to the BRI Petition, the BRI Facility is located north of the Lehigh Line and is served by a private spur, the Royce Spur, which connects to a track known as the Royce Running Track. BRI Pet., Reistrup V.S. at 6 and Exhibit 5 thereto.

### **BRI’s Claims**

BRI’s Petition claims that its facility “is located within the NJSAA,” (BRI Pet. at 17) and is therefore entitled under the Transaction Agreement and the NJSAA Agreement to receive switching service from Conrail to move cars between the BRI Facility and Manville Yard. BRI bases its claim entirely on the opinion of its consultant, Paul Reistrup. Although Mr. Reistrup was a CSXT employee between June 1, 1997 and February 2003, he does not claim that he was involved with or knowledgeable about the allocation of lines or determination of boundaries in the Transaction Agreement, which was executed a few days after he joined CSXT, or with any subsequent discussions among the parties on those matters. BRI’s claim rests simply on the opinion of Mr. Reistrup that the term “CP Port Reading Jct.” does not refer to a single point but rather to a fairly wide area, which is bounded by all the signals that are part of the “interlocking” that controls operations through Port Reading Junction. He states at page 5 of his verified statement:

It is important to understand that “CP-Port Reading Jct. does not refer just to the switch connection at the junction where the CSXT Trenton Line and the NS Lehigh Line converge. . . . CP-Port Reading Jct. includes track and facilities that extend beyond the switch connection, and the limits of the NJSAA also extend beyond this

point. The NJSAA includes everything . . . within the approach circuits for the interlocking(s) at the location involved. Normally, this includes all track, signals, turnouts and electronic circuitry between the approach signals for the interlocking.

Based on this interpretation of the term, Mr. Reistrup concludes that the NJSAA extends “at least two miles west of the mainline switch connection (turnout) between the Lehigh Line main track and the Trenton Line main track,” because that is where he says the approach signal is located. Reistrup V.S. at 6. Apparently as an alternative, he suggests that the NJSAA may extend only to the “home signal,” which he says is “about 250 yards west of the mainline turnout.” *Id.* Mr. Reistrup also states that “it is possible that [switch movements between Manville Yard and the BRI Facility] must presently use NS-owned track for a short distance outside the NJSAA even though most of the Royce Spur is within (or adjacent to Conrail property that is clearly within) the NJSAA.” Reistrup V.S. at 8.

BRI’s claim that the BRI facility is “within the NJSAA” and Mr. Reistrup’s assertions that the Royce Spur is within the NJSAA and that the BRI Facility may receive service from Conrail even though it must operate over NS-owned track all reflect a basic misunderstanding of the SAAs and the operating rules affecting SAAs, because they incorrectly assume that SAAs are broad geographic areas that encompass non-railroad property as well as railroad property. In fact, as noted above, SAAs consist solely of *railroad* property, and the critical question is not whether a shipper’s facility is itself “within” the SAA, but whether Conrail may *access* that facility solely by use of SAA tracks. Since, under the Shared Assets Agreements, Conrail may only operate over SAA tracks, it may not operate to, or provide switching services for, a facility if it can do so only by operating over non-SAA tracks of NS or CSXT.

Even if one assumes, however, that BRI's claim is that the BRI Facility is directly connected to the NJSAA and that Conrail can access the facility operating only over NJSAA track, the claim is wrong, as we shall see.

Mr. Reistrup cites nothing in the Transaction Agreement or the Application to support his interpretation of "CP Port Reading Jct.," and he makes no mention of the Map that is part of the Transaction Agreement. Nor does he cite any other authority in support of the remarkable proposition that one may reasonably assume that railroads have defined the boundaries between their properties not by reference to specific points but by reference to broad areas.

The only thing other than his opinion that Mr. Reistrup cites in support of his claims is a Conrail operating timetable (hereafter, the "Timetable"), which he contends shows that CP-Port Reading Junction is an area that includes areas west of Port Reading Junction, including the Royce Running Track, part of the Trenton Line and Manville Yard. *See* Reistrup V.S. at 5-6. As discussed below and in the attached verified statement of Timothy C. Tierney, Conrail's Chief Engineer, the Timetable shows no such thing.

### **What the Map Shows**

BRI's claims are squarely refuted by the Map that is part of the Transaction Agreement and that defines the lines that are allocated to NS (PRR), CSXT (NYC) and the SAAs. Exhibit 3 is an enlargement of a portion of the Map that shows the Trenton Line and the Lehigh Line as they approach Metropolitan New York and North Jersey from the south and west. It shows the Lehigh Line in green (*i.e.*, allocated to NS (PRR)) up to the point where that line joins the orange (*i.e.*, allocated to CSXT (NYC)) Trenton Line, which point the Map labels "CP-Port Reading Junction." Just to the east of that junction, the Lehigh Line

becomes blue (*i.e.*, is allocated to the NJSAA). Exhibit 3 also clearly shows the Royce Running Track, as well as the adjacent “Manville Siding” and the “VA Lead,” in green.

These allocations are shown even more clearly in Exhibit 4, which is an enlargement of an insert to the Map covering Metropolitan New York City and North Jersey. Exhibit 4 again shows the Lehigh Line up to its junction with the Trenton Line in green, as well as the Royce Running Track and the Manville Siding. It shows the Lehigh Line west of that junction in blue and it shows the Trenton Line south of that junction in orange.

The deed defining the limits of NS’s Lehigh Line in the area further confirms that it ends very near the current switch connection between the Lehigh Line and the Trenton Line. At Split Date, Conrail conveyed deeds to Pennsylvania Lines LLC (PRR) and New York Central Lines (NYC) LLC to carry out the Transaction. Exhibit 5 is the deed conveying Conrail property in Somerset County, NJ to PRR, and Exhibit B1 thereto shows the Lehigh Line up to Milepost 35.92 conveyed to PRR.<sup>3</sup>

In sum, it is clear from the Map that the Royce Running Track, which connects to the Royce Spur and which serves the BRI facility, is an NS line and is not in the NJSAA and further that the Royce Running Track joins the NS portion of the Lehigh Line west of its connection to the NJSAA.

### **The Conrail Timetable**

There is no basis for Mr. Reistrup’s contention that the Conrail Timetable shows that “CP-Port Reading Jct.” does not signify a point but rather an area at least two miles in radius.

---

<sup>3</sup> This point is a short distance west of the current switch connection between the Lehigh Line and CSXT’s Trenton Line. The point is located where the Trenton Line once crossed the Lehigh Line and extended north to Bound Brook, NJ, but the crossing track has since been removed. Where the Trenton Line crossed the Lehigh Line was known as Port Reading Junction; as a result of the removal of the crossing track, the actual junction of the two lines is now at the switch connection a short distance east of that point. For purposes of BRI’s claims, it is immaterial whether the boundary of the NJSAA is at Milepost 35.92 or at the current junction, since both points are east of where the Royce Running Track connects to the Lehigh Line (*see* Reistrup V.S., Exhibit 5) and since the Royce Running Track is NS track.

As explained by Mr. Tierney, Conrail's Chief Engineer, the purpose of this Timetable is "to describe in schematic form Conrail's tracks in the North Jersey District for the use and guidance of Conrail's operating employees." The shaded area on page 19 of the timetable (page 4 of Mr. Reistrup's Exhibit 4) merely indicates, schematically, the boundaries of the "interlocking" that governs the movements of trains over the tracks described. Tierney V.S. at 1. An interlocking, as Mr. Tierney states, is "an interconnection of signals and signal appliances such that their movements must succeed each other in a predetermined sequence, assuring that signals cannot be displayed simultaneously on conflicting routes."<sup>4</sup> *Id.* at 1-2.

As he also notes:

An interlocking may, and frequently does, include tracks of different railroads, but, by agreement among those railroads, one of them controls all movements over all tracks within the interlocking. The boundaries of an interlocking do not define the ownership of the various tracks within the interlocking and do not determine the use of equipment and personnel over those various tracks by those other railroads.

*Id.* at 2.

CP Port Reading Junction is part of an interlocking that is, by agreement of the railroads involved, controlled by Conrail. A "CP," or "Controlled Point" is simply a point where train movements over that point are governed by remotely controlled signals. Tierney V.S. at 2. *See also* 49 C.F.R. § 236.782, defining "Point, controlled" as "[a] location where signals and other functions of a control system are controlled from the control machine." Mr. Reistrup's contention that a Controlled *Point* is not a point but rather a wide area is refuted by Mr. Tierney and the FRA.

---

<sup>4</sup> *See also* 49 C.F.R. §236.751, where the Federal Railroad Administration defines a manual interlocking as "[a]n arrangement of signals and signal appliances operated from an interlocking machine and so interconnected by means of mechanical and/or electronic locking that their movements much succeed each other in proper sequence, train movements over all routes being governed by signal indication."

Finally, Mr. Tierney explains that the shaded area on page 19 of the Conrail Timetable applicable to CP Port Reading Jct. merely

signifies that the switches at that point and the signals controlling access to the interlocking are controlled by the Conrail North Jersey Train Dispatcher. The shaded area denotes the tracks within the interlocking controlled by the dispatcher. The shaded area does not indicate that the tracks within it are owned and operated by Conrail or are part of Conrail's North Jersey District. The shaded area includes portions of tracks that are operated by CSXT or Norfolk Southern and owned by affiliates thereof, including the Trenton Line and Manville Yard (CSXT) and the Lehigh Line and Royce Running Track (Norfolk Southern).

Tierney V.S. at 2.

### **Other BRI Allegations**

We will not address here BRI's complaints about increases in the rates it recently negotiated with NS or its claims about the supposed feasibility of Conrail providing service or its discussion of alternatives it may pursue if it does not get satisfaction from the Board because all of those issues are irrelevant to this motion to dismiss and to the issue of whether BRI's Petition states claims upon which relief may be granted as a matter of law. NS, of course, reserves the right to address those matters if the Board denies this motion. With respect to BRI's complaints about NS service, we will only note that NS takes such complaints seriously and has taken steps that it believes will improve the situation significantly. Service complaints, however, are not a proper basis for the relief BRI seeks in its petition and are therefore also irrelevant to this motion.

## ARGUMENT

### I. DISMISSAL IS WARRANTED WHEN, AS HERE, A PETITION PRESENTS ESSENTIALLY LEGAL ISSUES THAT ARE WITHOUT FOUNDATION.

In cases not dissimilar to this one, the Board and its predecessor, the Interstate Commerce Commission (“ICC”), have not hesitated to dismiss complaints “where the issues involved were essentially legal” and where the agency found the asserted grounds of the complaint legally deficient. Zoneskip, Inc. v. United States Parcel Service, Inc., 8 I.C.C. 2d 645, 650 (1992). In Zoneskip, the ICC dismissed a complaint alleging rate discrimination. Because the ICC found that the complainants’ basic legal position was incorrect, it said: “[W]e see no basis for going through discovery and protracted proceedings in order to permit Zoneskip to pursue legal claims that will inevitably prove fruitless.” Id. at 650-651. *See also Caribbean Shippers Association v. NPR, Inc.*, WCC-100, 1997 STB LEXIS 58, at \*8-9 (decision served March 25, 1997), dismissing a complaint alleging that the defendants wrongfully interfered with business relationships between the complainant and its members on the grounds that the issue raised by the complaint was “essentially a legal one” and that the complainant’s “position lacks merit as a matter of law.”

In this case, although BRI’s Petition is based on a seemingly factual allegation – that its facility is within (or connected to) the NJSAA – that should not shield it from dismissal because that claim is clearly and squarely refuted by the Transaction Agreement and because the claim is based on nothing more than the unsupported opinion of a consultant about the meaning of terms in the Transaction Agreement. In essence, therefore, its claim presents legal, not factual issues: namely, the meaning of terms in the Transaction Agreement and

whether the clear provisions of the Transaction Agreement may be overcome by opinions or evidence extrinsic to the four corners of the Transaction Agreement.

BRI's alternative claim for relief likewise presents issues of law and administrative policy that do not depend on the resolution of factual issues: namely, whether the Board may or should, in effect, rewrite the Transaction Agreement to place BRI within the NJSAA in order to give it access to a second railroad in the absence of a claim or any plausible showing that the railroad serving it has violated the law in ways that would entitle the shipper to competitive access under 49 C.F.R. Part 1144 and the Board's decisional precedents. Thus, for example, although BRI claims that it is no different from nearby shippers that are in the NJSAA and may be served by Conrail without operational difficulty (and is seeking discovery on those matters), the proper disposition of its prayer for relief does not depend on the Board's determination of those factual claims.

The fact that BRI styles its petition as a request for "clarification" of Decision No. 89, and, alternatively, as a request for a supplemental order under 49 U.S.C. § 11327, does not give it any greater protection from dismissal. On the contrary, viewed simply as a request for clarification of Decision No. 89, there is manifestly no basis for it, because Decision No. 89 needs no clarification. Although that decision did not address the status of this particular facility, that is because neither BRI nor any other party asked it to, either before Decision No. 89 or during the five years of oversight that the Board instituted to address problems that might develop during implementation of the Transaction. Nevertheless, the Decision clearly and expressly approved and authorized the carrying out of the terms of the Transaction Agreement "[e]xcept as otherwise provided in this decision." *Conrail Control*, 3 S.T.B. at 385.



If, on the other hand, the purported request for “clarification” is in reality a claim that the decision should be *reconsidered* and *modified* to address a specific situation not brought to the Board’s attention at the time, NS submits that the petition is eight years out of time. *See* 49 C.F.R. § 1115.3(e). Or, if it is in reality a request to *reopen* a decision that has long been administratively final under 49 U.S.C. § 1115.4, the only proper basis for such a petition would be new evidence or substantially changed circumstances. *See ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 286 (1986). BRI, however, has not alleged any new evidence or change in circumstances relevant to its claim.

Nor does the alternative request for a supplemental order under 49 U.S.C. § 11327 provide any greater immunity from dismissal. As discussed earlier, that request presents only legal and policy questions, not factual issues. Furthermore, relief under § 11327, like relief under 49 C.F.R. § 1115.4, should generally be confined to situations involving new evidence or substantially changed circumstances. It should not be a device for asking the Board simply to revisit decisions that have long been final and evade the limitations on petitions to reopen such decisions. *See People of State of Ill. v. ICC*, 713 F.2d 305, 310 (7th Cir. 1983) (under predecessor to § 11327 (49 U.S.C. § 11351) a party must show some event or change in circumstances which necessitates supplementation or modification); *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981) (statute requires and event or change in circumstances for the Board to exercise jurisdiction to supplement or modify an order).

In sum, the Board should not hesitate to dismiss petitions like this one that present essentially issues of law and policy that are unlikely to prevail. While sometimes the path of least administrative resistance may be to permit petitioners to pursue dubious claims, doing so – as the ICC recognized in the *Zoneskip* and *Caribbean Shippers Association* cases – can

impose substantial unnecessary costs and burdens not only on the responding parties but also on the petitioners and the Board. In this case, the Board should have little doubt about the lack of merit of BRI's essential claims and should spare the parties such burdens.

## **II. BRI'S CLAIMS ARE REFUTED BY THE CLEAR PROVISIONS OF THE TRANSACTION AGREEMENT.**

The discussion in the Statement of Facts shows that the clear terms of the Transaction Agreement and the Map refute BRI's claims that the BRI Facility is within, or is connected to, the NJSAA, and there is no need for extended further discussion of the point. BRI acknowledges that its facility connects, via its private Royce Spur, to the Royce Running Track and that the Royce Running Track in turn connects to the Lehigh Line west of Port Reading Junction. BRI Pet., Reistrup V.S. at 7-8. The Map clearly shows that the Royce Running Track as well as the Lehigh Line west of its junction with the CSXT-allocated Trenton Line were both allocated to NS and are not part of the NJSAA.

BRI's claims to the contrary are based entirely on the opinion of its consultant, Mr. Reistrup, about the meaning of a term in the Transaction Agreement that is incorrect and unreasonable for reasons we will discuss in the following argument. The threshold question of law presented by those claims, however, is whether evidence extrinsic to the Transaction Agreement, including the opinion of BRI's consultant, can overcome the clear terms of the agreement. The answer is no, both as a matter of well settled legal principles and under the specific terms of the Transaction Agreement.

It is well settled as a matter of general contract law that the clear and unambiguous terms of a contract may not be overcome by contrary evidence, extrinsic to the four corners of the contract, of the parties' intent or the meaning of the terms. *See* Restatement (Second)

Contracts §§ 213, 215; *Delaware and Hudson Ry. Co v. Consolidate Rail Corp. – Reciprocal Switching Agreement*, 9 I.C.C. 2d 989, 1993 ICC LEXIS 85, at \*30 (1993) (“[E]xtrinsic evidence may be received to interpret an integrated written contract only if the contract is in some manner ambiguous.”).

These principles are confirmed and reinforced by provisions of the Transaction Agreement itself. First, Section 11.5 of the Transaction Agreement provides, with specified exceptions not relevant here:

Entire Agreement. This Agreement (including the Exhibits and Schedules hereto and the Ancillary Agreements and other documents and instruments referred to herein) and the Merger Agreement, collectively, constitute the entire agreement and supersede all other prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof . . . .

In addition, Section 11.1 of the Transaction Agreement provides:

Amendment. This Agreement may be amended by the parties at any time by an instrument in writing signed on behalf of each party.

These provisions together ensure that the terms of the Transaction Agreement may not be altered by claims based on parol evidence or other evidence extrinsic to the agreement itself; the terms may be altered only by formal *written* amendments signed on behalf of each party.

As a matter of law, therefore, there is no basis for considering BRI’s claims and the merits of the grounds advanced in support of them. As a matter of law, the claims should be dismissed.

### **III. THE OPINION OF BRI’S CONSULTANT IS ALSO OF NO EVIDENTIARY VALUE AND IS PLAINLY UNREASONABLE.**

Even if it were appropriate to consider Mr. Reistrup’s opinion, the Board should reject it as of no evidentiary value and plainly unreasonable.

Mr. Reistrup's opinion is of no evidentiary value. It does not cite or rely on anything in the Transaction Agreement or other ancillary agreements and cites no authority for the proposition that the term "CP Port Reading Junction" does not signify a point but rather a wide area bounded by approach signals. The only thing he relies on is Conrail's Timetable, and Mr. Tierney's statement shows that the Timetable provides no support whatsoever for Mr. Reistrup's opinion.

Mr. Reistrup's interpretation of the term "CP Port Reading Jct." is also plainly unreasonable. The claim that a "Controlled Point" is not a point but an area is itself a contradiction in terms. Moreover, it is simply not reasonable to suppose that railroads would define the boundaries between their territories not by reference to specific points but in terms of *areas* bounded by signals. Doing so would make the boundaries between railroad territories imprecise and exceedingly difficult to determine. It would make the demarcation between railroad territories depend on where signalmen happened to locate signals, and it would make that demarcation subject to change whenever, for any reason, the signals were relocated.

In any event, not only the Map but also the deed by which Conrail conveyed the Lehigh Line to PRR in 1999 show that the railroads in this case defined the boundary of the NJSAA near the BRI Facility in terms of a point, not an area.

The fact that the various tracks surrounding Port Reading Junction are controlled by an interlocking controlled by Conrail says nothing about whose tracks they are and whether they are part of the NJSAA. As Mr. Tierney explains, an interlocking is an interconnected series of signals governing train movements over a track or group of tracks that is controlled by a single operator or control machine in order to prevent collisions and increase efficiency.

An interlocking may, and frequently does encompass the tracks of different railroads, but, by agreement among those railroads, the interlocking is controlled by one of them. That one railroad may control the train movements over all the tracks controlled by the interlocking does not mean that that railroad owns all the tracks or that its trains and personnel may operate over them.

In short, Mr. Reistrup's opinion concerning the boundary of the NJSAA near the BRI Facility is unsupported and unreasonable and should be rejected as such.

#### **IV. BRI'S ALTERNATIVE REQUEST FOR A SUPPLEMENTAL ORDER IS UNFOUNDED.**

As an alternative to finding the BRI Facility to be within the NJSAA, BRI asks the Board to issue a supplemental order under 49 U.S.C. § 11327 allowing Conrail to perform switching services moving cars between the BRI Facility and Manville Yard. BRI argues that such an order is warranted by deficiencies in NS's recent service to the facility, the importance of BRI's business, the fact that Conrail switch crews operate out of Manville Yard already to serve other customers connected to the NJSAA and BRI's belief that Conrail could serve its facility without causing operating difficulties. BRI Pet. at 10-14.

Although BRI denies that this request seeks to redraw the boundaries of the NJSAA (BRI Pet. at 1-2), that is precisely the effect it would have. But the reasons given for it – a desire for better service and more competition, the claim that it could be done without difficulty, etc. – are not a proper basis for rewriting the Transaction Agreement that the Board approved in Decision No. 89. Indeed, those are essentially the same grounds advanced by other shippers, which the Board correctly rejected in Decision No. 89, when it observed that granting such claims would probably cause the entire Transaction to collapse.

Shippers such as BRI have statutory remedies for inadequate service, and in some cases they may have contractual remedies as well. But BRI is in no different position from other shippers in the former Conrail territory outside the SAAs that may have complaints about service from NS and CSXT and that may desire to receive switching service from Conrail in addition to service from NS and CSXT. Nothing asserted in its Petition would justify the special relief it seeks by way of a supplemental order in the Conrail proceeding. Moreover, even if there were some basis for distinguishing BRI from other shippers outside the SAAs, as noted earlier, BRI has not alleged any material change in circumstances that might warrant a supplemental order under 49 U.S.C. § 11327.

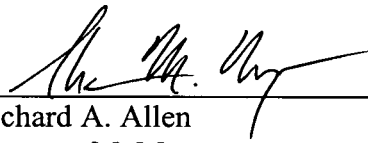
In essence, what BRI is seeking in its alternative claim for relief is nothing more nor less than competitive access. Under the Board's rules at 49 C.F.R. Part 1144 and decisions like *Midtec Paper*, however, a shipper seeking competitive access must make a convincing showing that the carrier serving the shipper has abused its market position so substantially as to violate its statutory obligations. BRI has not even alleged such circumstances, much less make a convincing showing of them. Nor could it plausibly allege such circumstances, particularly in view of the fact that it is obtaining its transportation services at the BRI Facility under a recently negotiated contract that specifies NS as the exclusive carrier to serve the facility and the enforcement of which, by both parties, is outside the Board's jurisdiction. See 49 U.S.C. § 10709.

## CONCLUSION

For the foregoing reasons, NS respectfully requests that the Board dismiss the “Petition For Clarification Or In The Alternative For Supplemental Order—North Jersey Shared Assets Area” filed by Bridgewater Resources, Inc. and ECDE Environmental, LLC.

Respectfully submitted,

John V. Edwards  
**NORFOLK SOUTHERN  
CORPORATION**  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
(757) 629-2657

  
Richard A. Allen  
Shannon M. Moyer  
**ZUCKERT, SCOUTT &  
RASENBERGER, LLP**  
888 Seventeenth Street, NW  
Suite 700  
Washington, D.C. 20006  
(202) 298-8660

*Attorneys for  
Norfolk Southern Railway Company*

February 9, 2006

## CERTIFICATE OF SERVICE

I certify that on February 9, 2006, a true copy of the foregoing "Motion of Norfolk Southern Corporation and Norfolk Southern Railway Company To Dismiss Petition For Clarification or in the Alternative For Supplemental Order of Bridgewater Resources, Inc. and ECDC Environmental, L.L.C." was served by first class mail, postage prepaid, or express mail upon:

Dennis G. Lyons, Esq.  
Arnold & Porter  
555 Twelfth Street, N.W.  
Washington, D.C. 20004-1202

Peter J. Schultz  
CSX Corp.  
Suite 560  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Paul R. Hitchcock  
Law Department  
CSX Transportation, Inc.  
500 Water Street  
Jacksonville, FL 32202

John F. Lettiere  
Commissioner, New Jersey  
Department of Transportation  
P.O. Box 6000  
Trenton, N.J. 08625-0600

State Review Process  
Office of the Governor  
P.O. Box 001  
Trenton, N.J. 08625

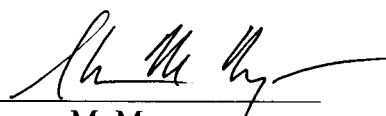
Christopher A. Mills  
Kendra A. Ericson  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

Jonathan M. Broder  
Vice President Law & General Counsel  
Consolidated Rail Corp.  
Two Commerce Square  
2001 Market Street  
Philadelphia, P.A. 19103

John K. Enright  
Associate General Counsel  
Consolidated Rail Corp.  
1000 Howard Boulevard  
Mt. Laurel, N.J. 08054

George D. Warrington  
Executive Director  
N.J. Transit  
One Penn Plaza East  
Newark, N.J. 07105-2246

Eric S. Strohmeyer  
CNJ Rail Corp.  
833 Carnoustie Drive  
Bridgewater, N.J. 08807

  
Shannon M. Moyer



Before The  
Surface Transportation Board

---

Finance Docket No. 33388 (Sub-No. 100)

---

CSX CORPORATION AND CSX TRANSPORTATION, INC.  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY  
— CONTROL AND OPERATING LEASES/AGREEMENTS —  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

**VERIFIED STATEMENT OF TIMOTHY C. TIERNEY**

My name is Timothy C. Tierney. I am the Assistant Vice President/Chief Engineer of Consolidated Rail Corporation ("Conrail"). I am giving this statement to discuss Exhibit 4 to the Verified Statement of Paul H. Reistrup dated January 9, 2006 and submitted in this proceeding by Bridgewater Resources, Inc.

Exhibit 4, which Mr. Reistrup calls an "operating timetable," is an excerpt from the Conrail Timetable, that was in effect between June 1, 1999 and January 17, 2000, as it pertained to the Conrail North Jersey District. Its purpose is to describe in schematic form Conrail's tracks in the North Jersey District for the use and guidance of Conrail's operating employees. For the various sections of track, it shows, among other things, maximum train speeds, weight and height restrictions, the general locations of sidings, running tracks and radio base stations.

The shaded areas on Exhibit 4 (Page 4 of 7) depict the interlockings on the portion of the Lehigh Line owned and operated by Conrail. An interlocking is an interconnection of signals and signal appliances such that their movements must succeed each other in a predetermined sequence, assuring that signals cannot be displayed

simultaneously on conflicting routes. An interlocking may, and frequently does, include tracks of different railroads, but, by agreement among those railroads, one of them controls all movements over all tracks within the interlocking. The boundaries of an interlocking do not define the ownership of the various tracks within the interlocking and do not determine the use of equipment and personnel over those various tracks by those other railroads.

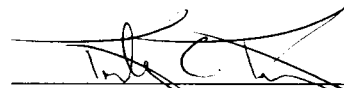
The term "CP" means "controlled point." A "CP" designation signifies a station designated in the Timetable where signals are remotely controlled from the control station either by the control operator or the train dispatcher.

Page 4 of Exhibit 4 (Page 19 of the Conrail Timetable) refers to "CP-Port Reading Jct.," and it shows a shaded area which includes CP-Port Reading Jct. and other nearby tracks, including "Trenton Line-CSX," "Royce R.T." and "Manville Yard." Port Reading Jct. is the point where Conrail's portion of the Lehigh Line terminates and Norfolk Southern's portion of the Lehigh Line begins and where the Lehigh Line meets CSXT's Trenton Line, and the designation "CP-Port Reading Jct." signifies that the switches at that point and the signals controlling access to the interlocking are controlled by the Conrail North Jersey Train Dispatcher. The shaded area denotes the tracks within the interlocking controlled by the dispatcher. The shaded area does not indicate that the tracks within it are owned and operated by Conrail or are part of Conrail's North Jersey District. The shaded area includes portions of tracks that are operated by CSXT or Norfolk Southern and owned by affiliates thereof, including the Trenton Line and Manville Yard (CSXT) and the Lehigh Line and Royce Running Track (Norfolk Southern).

VERIFICATION

I, Timothy C. Tierney, verify under penalty of perjury that I have read the foregoing verified statement and know its contents, and that it is true and correct to the best of my knowledge and belief. I further certify that I am qualified and authorized to make this statement.

Executed on February 3<sup>rd</sup>, 2006

  
\_\_\_\_\_  
Timothy C. Tierney  
Assistant Vice President/Chief Engineer

TRANSACTION AGREEMENT

by and among

CSX CORPORATION,

CSX TRANSPORTATION, INC.,

NORFOLK SOUTHERN CORPORATION,

NORFOLK SOUTHERN RAILWAY COMPANY,

CONRAIL INC.,

CONSOLIDATED RAIL CORPORATION

and

CRR HOLDINGS LLC

Dated as of June 10, 1997

TRANSACTION AGREEMENT

TRANSACTION AGREEMENT, dated as of June 10, 1997 ("Agreement"), by and among CSX CORPORATION, a Virginia corporation ("CSX"), CSX TRANSPORTATION, INC., a Virginia corporation, for itself and on behalf of its controlled Subsidiaries (collectively, "CSXT"), NORFOLK SOUTHERN CORPORATION, a Virginia corporation ("NSC"), NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation, for itself and on behalf of its controlled Subsidiaries (collectively, "NSR"), CONRAIL INC., a Pennsylvania corporation, for itself and on behalf of its controlled Subsidiaries (collectively, "CRR"), CONSOLIDATED RAIL CORPORATION, a Pennsylvania corporation ("CRC"), and CRR HOLDINGS LLC, a Delaware limited liability company ("CRR Parent").

WHEREAS, CSX and NSC have entered into a letter agreement dated as of April 8, 1997 (the "April 8 Agreement").

WHEREAS, pursuant to the April 8 Agreement, CSX and NSC have jointly acquired all of the outstanding capital stock of CRR through CRR Parent, in which CSX and NSC each owns a 50% voting interest.

WHEREAS, CSX and NSC are seeking the approval of the STB to undertake the transactions contemplated by this Agreement and the April 8 Agreement.

WHEREAS, pursuant to the April 8 Agreement the parties wish to provide herein for the governance and operation of CRR and its Affiliates and for the basis pursuant to which CRR's assets and liabilities will be allocated to or shared by CSX and its Affiliates, on the one hand, and NSC and its Affiliates, on the other hand, after the Closing Date (as hereinafter defined).

NOW, THEREFORE, in consideration of the premises and the respective agreements hereinafter set forth, the parties hereto agree as follows:

ARTICLE I

DEFINITIONS

Section 1.1. Defined Terms. As used in this Agreement, the following terms have the meanings set forth below:

"AAC" means Atlantic Acquisition Corporation, a Pennsylvania corporation and a wholly owned Subsidiary of NSC.

"AAR" means the Association of American Railroads.

in "Shared Assets Agreements" means the agreements between and among CRC, NYC, PRR, CSXT and/or NSR, substantially in the forms attached hereto as Exhibits G through I, providing for the operation of certain Retained Assets for the benefit of CSXT and NSR. The Shared Assets Agreements are listed in Item 3 of Schedule 4 hereto.

3 "Shared Assets Areas" means (a) the North Jersey shared Asset facility to be covered by the Shared Assets Agreement substantially in the form attached hereto as Exhibit G, (b) the South Jersey/Philadelphia shared Asset facility to be covered by the Shared Assets Agreement substantially in the form attached hereto as Exhibit H and (c) the Detroit shared Asset facility to be covered by the Shared Assets Agreement substantially in the form attached hereto as Exhibit I.

1 "SSO Facilities" means the CRR or CRC system support operations facilities described in Item 3(B) of Schedule 1 (including equipment and other Assets associated with such facilities) used as of the date hereof by CRR and CRC or their respective Affiliates to provide support functions benefitting the CRC rail system as a whole, including: (a) the customer service center in Pittsburgh, PA; (b) the crew management facility in Dearborn, MI; (c) the system maintenance-of-way equipment center in Canton, OH; (d) the signal repair center in Columbus, OH; (e) the system freight claims facility in Buffalo, NY; (f) the system non-revenue billing facility at Bethlehem, PA; (g) the system rail welding plant at Lucknow (Harrisburg), PA; (h) the system road foreman/engineer training center at Philadelphia and Conway, PA; (i) the CRC police operations center at Mt. Laurel, NJ; and (j) such other facilities providing system-wide support functions as CSX and NSC shall identify and agree upon prior to the Closing Date.

"STB" means the Surface Transportation Board or, if there shall be no Surface Transportation Board, any federal agency which is charged with the function of approving combinations by rail carriers or persons controlling them, or of other arrangements between such rail carriers, and granting exemptions from other laws with respect thereto or regulating other specific functions with respect to the context in which such term is employed or any successor entity thereof.

"Subsidiary" means, when used with reference to a specified Person, any corporation or other organization, whether incorporated or unincorporated, of which at least a majority of the securities or other interests having by their terms ordinary voting power to elect a majority of the Board of Directors or others performing similar functions with respect to such corporation or other organization is directly or indirectly owned or controlled by such Person or by any one or more of its Subsidiaries, or by such Person and one or more of its Subsidiaries; pro-

Closing Date shall be allocated and paid as otherwise provided in Article VI.

Section 2.5. Trackage, Haulage, Shared Asset and Other Operating Agreements. On the Closing Date and upon the terms and subject to the conditions set forth in this Agreement, each of CRC, CSXT and NSR shall execute and deliver, and the parties shall cause their respective Affiliates and NYC and PRR to execute and deliver, the following agreements to which it is a party:

(a) The Trackage Rights Agreements: A Trackage Rights Agreement covering each of the Routes listed in Item 1 of Schedule 4 and containing the terms and provisions applicable to such Route as set forth in Item 1 of Schedule 4 will be executed by the parties designated in such Item 1.

(b) The CSXT/NSR Haulage Agreements: A CSXT/NSR Haulage Agreement covering each of the Routes listed in Item 2 of Schedule 4 and containing the terms and provisions applicable to such Route as set forth in Item 2 of Schedule 4 will be executed by the parties designated in such Item 2.

(c) The Shared Assets Agreements.

(d) The Other Operating Agreements (in respect of Other Operating Agreements for which the relevant Exhibit hereto sets forth all or some of the terms of an agreement rather than the form of agreement, the parties shall use their best efforts to agree to the form of such Other Operating Agreements prior to the Closing Date).

Section 2.6. Equipment. The parties intend that all Equipment will be allocated between NYC and PRR (either as Allocated Assets or as Retained Assets which are subject to the NYC Equipment Agreement or the PRR Equipment Agreement) by series and condition such that NYC and PRR each receives Equipment by value in proportion to CSX's and NSC's respective Percentage. Disputes concerning such allocation shall be subject to binding arbitration under Section 11.12. After the Equipment has been allocated, the parties may agree in their sole discretion to changes in the allocation giving consideration to other factors. In furtherance of the foregoing sentence, the parties will appoint representatives to various teams to consider appropriate adjustments to allocations of Equipment as described below:

(a) Locomotive Equipment. Promptly after the date hereof, CSXT and NSR shall each appoint up to three members of a committee (the "Locomotive Team"). The Locomotive Team shall meet not later than January 1, 1998, to consider an adjustment to the allocation of locomotive Equipment (including appurtenances

SCHEDULE 1

ASSETS

Attached to and incorporated in this Schedule 1 are the following attachments:

(i) Attachment I, which is the line segment allocation list identifying each Route owned, operated or used by CRC and its Affiliates and indicating as to each Route whether it is included in the NYC Allocated Assets, the PRR Allocated Assets or the Retained Assets; and

(ii) Attachment II, which is a system map showing all Routes comprising the CRC rail system and indicating by color coding the Routes which are to be NYC Allocated Assets, PRR Allocated Assets and Retained Assets, respectively; Attachment II is intended to show graphically the Routes described in Attachment I.

ITEM 1 - NYC ALLOCATED ASSETS

The "NYC Allocated Assets" shall include all of CRR's, CRC's and their respective Affiliates' right, title and interest in and to the following Assets:

(A) **Routes and Assets Related to Routes.** All Routes identified as NYC Allocated Assets in Attachment I and Attachment II (i.e., those lines colored in red and/or orange on Attachment II, except for those lines already owned by CSXT or its Affiliates), together with the following Assets that are related to such Routes (except as otherwise expressly provided in this Schedule 1 or the Ancillary Agreements):

- (1) the track structure (rails, ties, other track material, grading, bridges, tunnels, culverts, etc.);
- (2) the underlying right-of-way, operating and non-operating, regardless of its width, and associated structures and fixtures;
- (3) except in the areas where the parties' respective Routes are approximately equidistant from the Asset in question (where in each case other arrangements are made pursuant to one or more Ancillary Agreements), appurtenant yards, sidings, switch tracks and repair or other maintenance facilities;



- (10) royalties or other payments in respect of real estate or other Assets heretofore described in this paragraph (A).

(B) **Philadelphia Offices.** The CRC headquarters office building located at Philadelphia, PA, and the CRC information technology center building located at Philadelphia, PA and all FF&E located at such facilities.

(C) **Yards and Yard Access.** The following CRC yards, land and yard access tracks:

- (1) Seneca Yard (Buffalo, NY) (subject to access and use by NSR pursuant to Ancillary Agreement);
- (2) 59th Street ("Panhandle") Yard site (Chicago, IL);
- (3) Collinwood Yard (Cleveland, OH);
- (4) Former "local yard" and intermodal terminal at Buckeye (Columbus, OH);
- (5) Buckeye Yard Lead track from the north limit of "CP Buckeye" to "CP Darby" (Columbus, OH);
- (6) West track between "CP 138" and "CP 136" (Columbus, OH);
- (7) Portion of Piqua Yard (Fort Wayne, IN) to be agreed upon between NSR and CSXT;
- (8) Hawthorne Yard (Indianapolis, IN) (subject to access and use by NSR pursuant to Ancillary Agreement);
- (9) North Bergen intermodal terminal (New Jersey);
- (10) South Kearny intermodal terminal including APL leased areas; however, NSR to have access to the APL leased terminal and NSR to have the right to serve APL and any successor lessee to APL using such leased premises;
- (11) Greenwich Yard (Philadelphia), but excluding yard tracks and areas used to support the movement of local freight (including port traffic, but excluding intermodal) and to support the movement of rail traffic to and from the ore pier, which tracks and areas will be included in Retained Assets;

- (12) Track from CP Field to Pier 122 (Greenwich Yard area, Philadelphia);
- (13) Stanley Yard (Toledo, OH);
- (14) Elizabeth Yard (Trumbull Street Yard), but subject to use of and access to two tracks by NSR to support E-Rail Intermodal Facility as provided in Ancillary Agreements; and
- (15) Manville Yard (subject to use by CRC, CSX and NSR pursuant to Ancillary Agreements).

(D) **Miscellaneous Property.** The following Assets:

- (1) Developable property west of CRC's Chemical Coast Secondary in northern New Jersey in the vicinity of the current CRC Elizabethport Yard (Trumbull St. Yard);
- (2) Indianapolis Division headquarters building, offices and land; and
- (3) Albany Division headquarters building, offices and land.

(E) **Stock Ownership and Other Interests.** The following interests:

- (1) 50% of the issued and outstanding capital stock in Lakefront Dock & Railroad Terminal Company;
- (2) 100% of the issued and outstanding capital stock in St. Lawrence & Adirondack Railway;
- (3) 50% of the issued and outstanding capital stock in Albany Port Railroad Corp.; and
- (4) 10.125% of the issued and outstanding capital stock in TTX Company.<sup>1</sup>

<sup>1</sup> CRC's 21.807% stock interest (3,500 shares) in TTX Company is allocated as follows:

	CSXT/NYC		NSR/PRR	
Current	9.345%	(1,500 shares-CSXT)	7.788%	(1,250 shares-NSR)
CRC Splits	<u>10.125%</u>	(1,625 shares-NYC)	<u>11.682%</u>	(1,875 shares-PRR)
Combined	<u>19.470%</u>	(3,125 shares)	<u>19.470%</u>	(3,125 shares)

---

**SHARED ASSETS AREA**  
**OPERATING AGREEMENT**  
**FOR**  
**NORTH JERSEY**

Dated as of \_\_\_\_\_, 199\_

By and Among

**CONSOLIDATED RAIL CORPORATION,**  
**CSX TRANSPORTATION, INC. and**  
**NORFOLK SOUTHERN RAILWAY COMPANY**

SHARED ASSETS AREA  
OPERATING AGREEMENT  
FOR  
NORTH JERSEY

This SHARED ASSETS AREA OPERATING AGREEMENT ("Agreement") dated as of \_\_\_\_\_, 199\_, is by and among Consolidated Rail Corporation ("CRC"), CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSR").

WITNESSETH:

WHEREAS, all capitalized terms in this Agreement have the respective meanings set forth in *Section 1*; and

WHEREAS, CSX owns all of the common stock of and controls CSXT, NSC owns all of the common stock of and controls NSR, and CSX and NSC jointly control CRC; and

WHEREAS, CSXT, NSR and CRC desire that the Shared Assets shall be owned, operated and maintained by CRC and used by or for the exclusive benefit of CSXT and NSR, and that CSXT and NSR shall each have full and equal rights to use the Shared Assets to provide competitive railway freight transportation services to, from and between all places within the Shared Assets Area.

NOW, THEREFORE, in consideration of the premises, covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, CRC, CSXT and NSR hereby agree as follows:

**Section 1. Definitions.** For purposes of this Agreement, the following terms have the following meanings:

- (a) "AAR" means the Association of American Railroads.
- (b) "Accounting Plan" means the Plan of Accounting adopted pursuant to *Section 9(a)*.

p

(pp) "Routine Maintenance" means day-to-day repairs to track, signals, structures and other fixed facilities that are not part of Program Maintenance.

(qq) "Severable Improvement" means a capital improvement which is not a Nonseverable Improvement.

(rr) "Shared Asset Value" means at any date the value of the Shared Assets, except leases and other contract rights granted by either Operator to CRC, as of the most recent preceding Valuation Date as determined by such appraiser as CSXT and NSR may select.

(ss) "Shared Assets" means all tracks, lands, easements, rights of way, structures, facilities, appurtenances and rights related thereto, which CRC owns, leases or otherwise has the right to operate over (including those segments over which CRC or an Operator possesses operating rights pursuant to *Section 3(c)*), and which are used for railway purposes in the Shared Assets Area, including the properties, rights, equipment, inventory and supplies, whether owned or leased, described or referred to in Item 3A of Schedule 1 (including Attachments I and II) of the Transaction Agreement, but excluding Operator's Facilities.

(tt) "Shared Assets Area" means the geographical area comprising the Shared Assets and Operator Facilities and Jointly-Operated Facilities directly (without intermediate connection to another railroad) attached to trackage included within the Shared Assets, which is designated as the "North Jersey" Shared Assets Area.

(uu) "STB" means the Surface Transportation Board or, if there shall be no Surface Transportation Board, any federal agency which is charged with the function of approving combinations by rail carriers or persons controlling them, or of other arrangements between rail carriers, and granting exemptions from other laws with respect thereto or regulating other specific functions with respect to the context in which such term is employed or any successor entity thereof.

(vv) "Switching and Yard Services" means the service of classifying and assembling trains for the account of an Operator in Jointly-Operated Facilities; movement of loaded or empty Railcars between yards and local industries; and switching trains and Railcars at yards, terminals and local industries.

(ww) "Tax" or "Taxes" means taxes of any kind, levies or other similar assessments, customs, duties, imposts, charges or fees, including, without limitation, income taxes, gross receipts, ad valorem, excise, real or personal property, sales, use, payroll, withholding, unemployment, transfer and gains taxes or other governmental taxes imposed by

furnishing of equipment and mechanical services. For purposes of this *Section 2(f)*, independent contractors may include CSXT or NSR.

### Section 3. Operations.

(a) *Operator's Rights.* CRC hereby grants to each Operator full operating rights to operate its own trains (staffed by a road crew) and equipment, with its own crews and equipment and at its own expense, over any and all tracks included in the Shared Assets, and to use all of the Shared Assets in connection with the operation of such trains or equipment, for the following purposes:

(i) Movement by such Operator of trains (staffed by a road crew) through the Shared Assets Area between two geographical locations outside the Shared Assets Area;

(ii) Movement by such Operator of trains (staffed by a road crew) between a geographical location outside the Shared Assets Area and an Operator's Facility or a Jointly-Operated Facility which is within the Shared Assets Area;

(iii) Movement by such Operator of trains (staffed by a road crew) between a geographical location outside the Shared Assets Area and local industries which are within the Shared Assets Area;

(iv) Movement by such Operator of trains (staffed by a road crew) between Operator's Facilities or Jointly-Operated Facilities which are within the Shared Assets Area and local industries which are within the Shared Assets Area;

(v) Movement, handling, pick-up, set off, switching, transfer and interchange of Railcars, blocks of Railcars or trains (staffed by a road crew) to, from or at local industries, Operator's Facilities or Jointly-Operated Facilities, in connection with movements described in *Sections 3(a)(i) through (iv)*, to the extent provided for in the Local Movement Guidelines agreed to and modified by the parties from time to time (but not less frequently than annually); and

(vi) such other purposes as may be agreed upon by CRC, CSXT and NSR.

(b) *Use.* The crews of each train operated by an Operator on Shared Assets shall be qualified under and shall comply with applicable laws and regulations as well as the safety and operating rules of CRC.

(c) *Grant of Rights.* Subject to reasonable compensation and other terms established in the Accounting Plan, and in each case for the purpose of Switching and Yard Services performed by CRC pursuant to *Section 3(d)* and movement of Operator Trains pursuant to *Section 3(a)*:

(i) CSXT hereby grants to CRC and NSR overhead operating rights to operate CRC trains and NSR trains, respectively, with their own crews, over the following CSXT rail line segments:

(A) the current CRC River line between CP2 and the Ridgefield Heights Auto Facility (including the right to serve such Ridgefield Heights Auto Facility); and

(B) such other CSXT line segments access to and use of which by CRC and NSR are necessary to effectuate the train operations and services contemplated by this Agreement; and

(ii) NSR hereby grants to CRC and CSXT overhead operating rights to operate CRC trains and CSXT trains, with their own crews, over such NSR line segments access to and use of which by CRC and CSXT are necessary to effectuate the train operations and services contemplated by this Agreement; and

(iii) CSXT hereby grants to CRC and NSR the right to use Manville Yard for the purpose of basing local trains, classifying and assembling trains and switching Railcars, but not for the purpose of serving local industries located at such yard.

Notwithstanding any other provision of this Agreement, each rail line segment identified in this *Section 3(c)* shall be dispatched, maintained, operated and controlled by the Operator which granted the rights with respect to such segment, *provided* that such dispatching, maintenance, operation and control shall be performed on an impartial and non-discriminatory basis as between the Operators. Trains operated by an Operator pursuant to operating rights granted under this *Section 3(c)* shall be governed by and subject to the Local Movement Guidelines.

(d) *Switching and Yard Services.*

(i) At the request of and as agent for each Operator, CRC shall perform Switching and Yard Services required by such Operator within the Shared Assets Area, including without limitation any such services which such Operator may be responsible for performing or having performed for a shipper or other Person.

NS Inte  
CP Wox  
CP Poi

11A  
2N





This instrument prepared by  
and please return to:

Linda V. Hill-Everett  
Senior Real Estate Counsel  
Norfolk Southern Corporation  
Suite 1702, One Georgia Center  
600 West Peachtree Street, NW  
Atlanta, Georgia 30308-3603

*Linda V. Hill-Everett*  
Linda V. Hill-Everett

Name and Address of Taxpayer:  
Pennsylvania Lines LLC  
c/o Norfolk Southern Railway Company  
110 Franklin Road SE  
Roanoke, Virginia 24042-0028

COMMONWEALTH LAND TITLE INS.  
PO BOX 532  
CEDAR KNOLLS NJ 07927

m375e

FILED

JUN 01 1999

DEFOREST B. SOARIES, JR.  
SECRETARY OF STATE

QUITCLAIM DEED

THIS INDENTURE, made the 1st day of June, 1999,

BETWEEN: CONSOLIDATED RAIL CORPORATION, a Pennsylvania corporation, having  
its principal office at 2001 Market Street, Philadelphia, Pennsylvania 19101-1419, referred to as the  
Grantor,

AND PENNSYLVANIA LINES LLC, a Delaware limited liability company, and wholly  
owned subsidiary, whose tax mailing address is c/o Norfolk Southern Railway Company, 110  
Franklin Road SE, Roanoke, Virginia 24042-0028, referred to as the Grantee.

WHEREAS, as a plan of corporate reorganization, Grantor has created Grantee as its wholly  
owned subsidiary; and

WHEREAS, as a part of that plan of reorganization, Grantor has agreed to a contribution  
to the capital assets of Grantee of certain real estate interests, including lines of railroad thereon, in  
several states within the United States;

**Transfer of Ownership.** The Grantor does hereby remise, release, and forever quitclaim  
unto the said Grantee the property described below. This transfer is made for no consideration. The  
said Grantor hereby quitclaims unto the said Grantee, its successors and assigns, the property  
identified below.

BK2258PG381

COUNTY OF SOMERSET

CONSIDERATION - 0 -  
REALTY TRANSFER FEE - 12.24  
DATE 6/1/99 BY CH

REC SEP 23/1999 12:24PM 045441

SOMERSET COUNTY CLERK SDH 66.00

**Tax Map Reference.** (N.J.S.A. 46:15-2.1) Municipality of \_\_\_\_\_, Block No. \_\_\_\_\_, Lot No.(s) \_\_\_\_\_, Account No. \_\_\_\_\_.

[ X ] No property tax identification number is available on the date of this Deed. (Check box if applicable.)

**Property.** The property consists of all of Grantor's interests in the Real Estate situated in the County of Somerset, State of New Jersey, substantially as shown on Exhibit A and more particularly described in Exhibit B, attached hereto and made a part hereof (hereinafter "Property"). TOGETHER with, in "as is, where is" condition and without any express or implied warranty, as to condition or fitness for any purpose, all of Grantor's right, title, and interest in the road bed, tracks, depots, yards, storage and parking areas, culverts, bridges, tunnels, buildings, structures, communication and signal facilities, fixtures, and all other railroad appurtenances located upon or appurtenant to the Property, and all sidings and spur tracks contiguous to and connected to the Property, except as provided in the attached Exhibits; TOGETHER with all mineral rights, timber rights, rights to cross public roads, fiber optic rights, rights of repurchase or reversion, and air rights in any way appertaining to the Property; SUBJECT, however, to any conditions, restrictions, reservations, agreements, leases, encroachments, licenses or easements, whether or not of record; and, RESERVING, unto Grantor, its successors and assigns, but only to the extent and duration necessary to continue in effect those existing fiber optic agreements of Grantor impacting the property which have been reserved by Grantor under a separate agreement, a nonexclusive easement to install, construct, operate, maintain, repair, renew, and replace a fiber optic communication system over, through, and across the Property. Such easement providing for and including, but only to the extent required by the existing fiber optic agreements, among other things, the right to install, construct, operate, maintain, repair, renew and replace fiber optic cable, associated electronics, repeater shelters, terminal facilities, connection boxes and pull boxes, and related facilities; the right to install power supply facilities; the right to attach the fiber optic cable and related facilities to existing bridges and to install it in existing tunnels; and the right of ingress and egress for access purposes; all such rights to be exercised without any payment by Grantor for same. Such easement to be exercised in a manner which does not interfere with the rail operations of Grantee or the ability of Grantee to grant other such communication easements or licenses, except to the extent the effective exercise of this easement reasonably entails such interference, and upon exercise of such easement, Grantor, at Grantor's sole expense, will restore the Property to a condition adequate for continued rail operations by Grantee.

**Type of Deed.** This Deed is called a Quitclaim Deed. The Grantor makes no promise as to ownership or title, but simply transfers whatever interest the Grantor has to the Grantee.

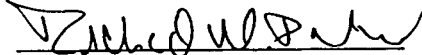
(REMAINDER OF PAGE INTENTIONALLY LEFT BLANK)

BK 2258 PG 382

**CERTIFICATION OF ADDRESS**

I hereby certify that the precise residence of the Grantee herein is:

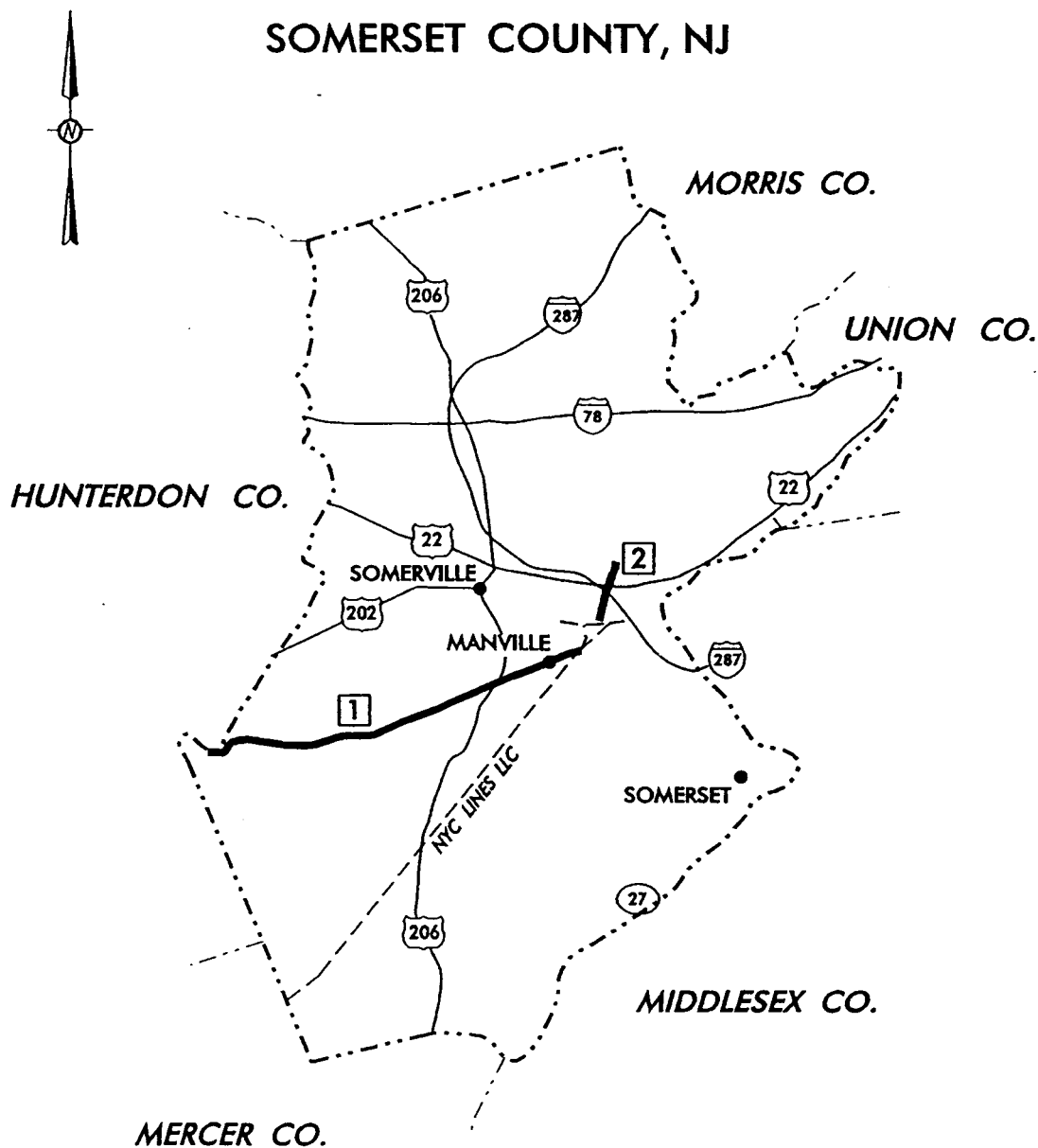
Pennsylvania Lines LLC  
c/o Norfolk Southern Railway Company  
110 Franklin Road SE  
Roanoke, Virginia 24042-0028

  
\_\_\_\_\_  
For Grantee

NJ-SOMERSET-CRQCD  
REV. 5/12/99

BK2258PG384

# EXHIBIT A SOMERSET COUNTY, NJ



- 1 LC 0502A, VS 3
- 2 LC 0231, VS 1b

BK2258PG385

**EXHIBIT B**

**Somerset County, New Jersey**  
**Lehigh Valley Railroad Company**  
**Lehigh Valley Main Line**

All right, title and interest of Grantor in that line of railroad being the former Lehigh Valley Railroad Company, being known as the Lehigh Valley Main Line, comprised of land and right of way for main tracks, branch lines, sidings and other appurtenant railroad facilities lying and being in Somerset County, New Jersey, being further identified as USRA Line Code 0502A as described in deed from Robert C. Haldeman, as Trustee of the Property of Lehigh Valley Railroad Company to Consolidated Rail Corporation, as recorded with the Office of the County Clerk of Somerset County, New Jersey, in Book 1511, Page 363, and being more particularly described as follows:

Said portion of the Lehigh Valley Railroad, which runs between Port Reading Junction and the common line between Somerset and Hunterdon County, beginning at a point on the track centerline of said Railway, said point being at the northwesterly right of way of the former Delaware and Bound Brook Railroad near Manville at approximate Railway Valuation Station 2244+97, more or less, as shown on Exhibit B-1 and on Railway Valuation Map V-3/24; thence, continuing along the centerline of track with a right of way of varying width in a generally westwardly direction for a distance of 57,694 feet, more or less, to a point at the common line between Branchburg Township, Somerset County and Readington Township, Hunterdon County, New Jersey, said point being further identified as Railway Valuation Station 1668+03 as shown on Railway Valuation Map V-3/35. Said portion of railroad being substantially as shown on Railway Valuation Maps V-3/24 through V-3/35, inclusive, attached hereto and made a part hereof.

**The Central Railroad Company of New Jersey**  
**Middle Brook Branch**

All right, title and interest of Grantor in that line of railroad being the former The Central Railroad of New Jersey, being known as the Middle Brook Branch, comprised of land and right of way for main tracks, branch lines, sidings and other appurtenant railroad facilities lying and being in Somerset County, New Jersey, being further identified as USRA Line Codes 0231, 0201 as described in deed from R. D. Timpany, as Trustee of the Property of The Central Railroad Company of New Jersey, to Consolidated Rail Corporation, dated March 30, 1976, as recorded with the Office of the County Clerk of Somerset County, New Jersey on October 12, 1978, and being more particularly described as follows:

Said portion of railroad beginning at a point on the track centerline of said Railway, said point being at the northerly right of way of the former Central Jersey Main Line Railroad, which runs between Jersey City and Philadelphia, and identified as Railway Valuation Station 0+00, more or less, as shown on Railway Valuation Map V-1b/39a; thence,

continuing with said Railway along the centerline of track with a right of way of varying width in a generally northerly direction for a distance of 10,671 feet, more or less, to the point of terminus, said point being further identified as Railway Valuation Station 106+71 as shown on Railway Valuation Map V-Ib/39b. Said portion of railroad being substantially as shown on Railway Valuation Maps V-Ib/39a and V-Ib/39b attached hereto and made a part hereof.

**Also, INCLUDING** Grantor's remaining rights, title and interest in the line of Railroad known as the Raritan Valley Railroad that lies west of Middle Brook Branch including Somerville Yard.

